UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

SHERRY L. BODNAR, on Behalf of herself and All Others Similarly Situated, **Plaintiff,** **vs.** **BANK OF AMERICA, N.A.,** **Defendant.**	**Case No. 5:14-cv-03224-EGS**

REPLY MEMORANDUM OF LAW IN SUPPORT OF
THE CLASS'S EMERGENCY MOTION TO REQUIRE AN APPEAL BOND

INTRODUCTION

Objector Dawn Weaver ("Weaver" or "Objector") offers no legitimate opposition to the Court requiring her to post a bond. Instead, she opposes Plaintiff's request that the appeal bond include costs of settlement administration. Weaver's attack consists largely of arguing that this Court should (a) ignore the Third Circuit's on-point 2014 decision, *In re Nutella Mktg. & Sales Practices Litig.*, 589 F. App'x 53 (3d Cir. 2014), because it is unpublished, and instead (b) follow a less on-point 1997 Third Circuit decision that was also unpublished. This contradictory argument is typical of the strategy employed by Weaver's professional objector counsel, Christopher Bandas, in his attempts to delay class action settlements to extort ill-gotten legal fees.

Because the Third Circuit's decision in *Nutella* goes against her, Weaver looks to a Tenth Circuit decision for support. *Tennille v. Western Union Co*., 774 F.3d 1249 (10th Cir. 2014). But while *Tennille* was decided after *Nutella*, *Tennille* ignored *Nutella* and instead referenced a 1997 Third Circuit case that did not reach the issue of settlement administration costs. *Id*. at 1255 (citing *Hirschensohn v. Lawyers Title Ins Corp*., No. 96-732, 1997 WL 307777 (3d Cir. 1997)). Weaver claims that *Tennille* found that eight other appellate courts stood for the proposition that settlement costs could not be included in a bond. But as discussed herein, upon examination of the cases cited in *Tennille,* none of them stand for such a proposition.

This Court is now familiar with the tactics Bandas employs. What is more, at the end of their brief, Weaver and Bandas essentially guarantee that should the Court grant Plaintiff's Motion, they "will create the very delay that Class Counsel claim they wish to avoid" by appealing entry of the bond to the Third Circuit. Opposition ("Opp.") at 18. The Court should not countenance this threat. Requiring an appeal bond here, covering components that the Third Circuit has found to not be an abuse of discretion, is proper. Plaintiffs' motion to require a bond in the amount of $256,000 should be granted.

ARGUMENT

A. Objector Fails to Address Most of the Factors Weighing in Favor of a Bond

Objector Dawn Weaver does not dispute that because she and Bandas reside outside of Pennsylvania, the risk of nonpayment of costs incurred on appeal is great, as collection of those costs may be difficult. She additionally has not offered any evidence that she and her counsel have a financial inability to post a bond.[1] Further, she does not contest the dubious track record of her serial objector counsel, Bandas. In short, of the factors considered by courts in assessing appellate bonds, *see* Mot. at 4, the only factor Weaver seriously contests is whether or not her

[1] Objector does make a generalized argument that she "has a right to appeal the court's decision." Opp. at 1-2. Plaintiff agrees. But she has offered no evidence that entry of a bond would prevent her appeal from proceeding. Therefore, this factor weights in Plaintiff's favor. *See, e.g., Miletak v. Allstate Ins. Co.*, No. 06-3778, 2012 WL 3686785, at *2 n.4 (N.D. Cal. Aug. 27, 2012) (absence of objector financial records demonstrating inability to pay bond "weighs in favor of imposing an appeal bond"); *Chiaverini, Inc. v. Frenchie's Fine Jewelry, Coins & Stamps, Inc.*, No. 04-CV-74891-DT, 2008 WL 2415340, at *2 (E.D. Mich. June 12, 2008) ("There is no indication that plaintiff is financially unable to post bond, and thus this factor weighs in favor of a bond.").

appeal is meritorious (although, in so doing, she merely rehashes failed arguments that this court "carefully considered" and rejected, *see* Dkt. No. 90 ¶ 16; Dkt. No. 91 at 57). Opp. at 10-15; *see infra* Section C. Therefore, even if the Court finds that portions of Weaver's appeal could have merit, all of the other factors that she ignored weigh in favor of entry of a bond.

B. Weaver Mischaracterizes the State of the Law in the Third Circuit and Elsewhere

In support of her argument that administrative costs cannot be included in an appellate bond, Weaver demands that the Court ignore both the Third Circuit's 2014 decision in *In re Nutella Mktg. & Sales Practices Litig.*, 589 F. App'x 53, 61 (3d Cir. 2014), and this Court's ruling in *Glaberson v. Comcast Corp.*, No. 03-6604, 2015 WL 7887788, *3-4 (E.D. Pa. Dec. 3, 2015), which followed *Nutella*. Objector asserts that this Court is forbidden to rely on *Nutella* because it is unpublished and therefore non-binding. Opp. at 3-4. Instead, Weaver argues this Court should follow another unpublished decision that does not address this issue and that was decided 17 years before *Nutella*. Opp. at 3-6 (citing *Hirschensohn*, 1997 WL 307777). Weaver also cites case law from other districts and circuits which (in addition to not standing for the proposition she urges, as discussed below) can—by her own logic—likewise not represent authority that controls this Court's decisions. This internal contradiction is a weak attempt to avoid the clear and on-point holding in *Nutella*: namely, that it is not an abuse of discretion for a district court to hold "that administrative costs could be secured by a Rule 7 bond." 589 F. App'x at 61.

1. Weaver misstates the law of the Third Circuit.

Weaver claims that the Third Circuit's opinion allowing for settlement administration costs in a bond in *Nutella* "contains essentially no analysis." Opp. at 4. This is ironic because the case that Weaver relies on does not even address the issue of administrative costs. The only issue before the Court in *Hirschensohn* was "whether anticipated attorneys' fees . . . may be considered as 'costs' on appeal and the subject of an appeal bond." 1997 WL 307777 at *1.[2] The Court did not even consider whether settlement administration costs could be included. *See id.* at 3 (holding that "Rule 7 does not grant authority to receive a bond ***for attorneys' fees*** in this case") (emphasis added). Therefore, as to the issue of settlement administration costs, the court's decision in *Hirschensohn* ***actually*** contained no analysis.

On the other hand, and contrary to Objector's claim, the Court in *Nutella* made specific reference to Fed. R. App. P. 7, 589 F. App'x at 60-61 before going on to analyze in detail the propriety of including settlement administration costs in a bond:

> Second, the District Court's imposition of a bond of $22,500 was not an abuse of discretion. The plaintiffs requested an appeal bond of $42,500, where the plaintiffs estimated their costs at $2,500 and an additional $40,000 of expenses in administering the settlement fund over a two-year period. The District Court determined . . . that administrative costs could be secured by a Rule 7 bond. We do not find that determination to be in error. Furthermore, the District Court decreased the $40,000 request by half, to $20,000 in administrative costs, in order to limit the amount of administrative costs related to the settlement fund to a one-year period. Accordingly, the District Court's imposition of an appeal bond of $22,500 in this case . . . was not an abuse of discretion.

Id. at 61. Plaintiff here followed *Nutella* in its entirety by seeking only one year's worth of settlement administration costs. Mot. at 14-18.

To the extent Weaver seeks to argue that unpublished Third Circuit decisions such as *Nutella* have no persuasive value, this Court has repeatedly held otherwise, especially where a decision is directly on-point, like *Nutella* is here. Indeed, "[t]hough an unpublished opinion of the Third Circuit is not binding precedent upon this court, it is extremely persuasive, ***especially when it addresses the precise issue before this court***." *Landau v. Reliance Standard Life Ins. Co.*, No. CIV. A. 98-903, 1999 WL 46585, at *3 (E.D. Pa. Jan. 13, 1999) (emphasis added); *see also, e.g., Banks v. Wells Fargo Bank, N.A.*, No. CIV.A. 09-4948, 2011 WL 5555728, at *11

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[2] Notably, Plaintiff *did not* ignore *Hirschensohn* in her Motion and, recognizing its persuasive value, explicitly declined to ask for attorneys' fees to be part of the bond. Mot. at 13 n.2.

(E.D. Pa. Aug. 17, 2011), *report and recommendation adopted*, No. CIV.A. 09-4948, 2011 WL 5555835 (E.D. Pa. Oct. 27, 2011) ("Unpublished, non-precedential Third Circuit opinions may be considered persuasive."). Thus, as the most directly on-point authority from the Third Circuit, *Nutella* should be extremely persuasive on this Court.

Objector goes on to reference the District of New Jersey's recent decision in *Schwartz v. Avis Rent a Car System LLC*, No. 11-4052, 2016 WL 4149975 (D.N.J. Aug. 3, 2016) for the proposition that most trial courts in the Third Circuit decline to impose settlement administration costs in an appeal bond. Mot. at 5. But the cases that *Schwartz* referenced—also relied upon by Objector here—all predated the *Nutella* decision, which was issued in September of 2014. Mot. at 5; *Schwartz*, 2016 WL 4149975, at *4 (citing *In re Certainteed Fiber Cement Litig.*, MDL No. 2270, 2014 WL 2194513, at * 4 (E.D. Pa. May 27, 2014); *In re Ins. Brokerage Antitrust Litig.*, MDL No. 1663, 2007 WL 1963063, at *5 (D.N.J. June 2, 2007); and *In re Diet Drugs*, MDL No. 1203, 2000 WL 1665134, at * 5 (E.D. Pa. Nov. 6, 2000)). In fact, this Court in *U.S. ex rel. Ryan v. Endo Pharms., Inc.*, No. 05-3450, 2014 WL 4209219, at *3 n.7 (E.D. Pa. Aug. 25, 2014)—which was decided shortly before *Nutella*—noted that, although non-binding, *Hirschensohn* had "been universally followed within this Circuit" to that point. Therefore, it is not surprising that in the only decision issued by this Court later in time than *Nutella* to confront the settlement administration costs issue—*Glaberson*, 2015 WL 787788, at *3 (E.D. Pa. Dec. 3, 2015)—this Court properly followed *Nutella* and included such costs, rather than relying on the outdated (and less on-point) *Hirschensohn*. Objector characterizes *Glaberson* as an "outlier," Opp. at 6, but Plaintiff submits that the true "outlier" is *Schwartz*, as it is the only district court case to not follow the most recent Third Circuit authority on the question of settlement administration costs. The Court should follow *Nutella* and *Glaberson* and include such costs in the bond here.

2. The additional authority on which Weaver relies does not support her argument.

Despite her claim that the Court should only follow published Third Circuit authority, Weaver presents various outside authorities to support her position. "[T]he decisions of other circuit courts are not binding on this Court." *Ellis v. Budget Maint., Inc.*, 25 F. Supp. 3d 749, 757 (E.D. Pa. 2014), *appeal dismissed* (Nov. 25, 2014). In any event, Weaver's cited authority does not support her position.

Weaver references the Tenth Circuit's decision in *Tennille v. Western Union Co.*, 774 F.3d 1249, 1256 (10th Cir. 2014), which believed there to exist "unanimous circuit authority restricting an appeal bond to costs expressly permitted by rule or statute." But *Tennille* cited *Hirschensohn* for the state of the law in the Third Circuit, in spite of the fact that *Tennille* was decided three months after *Nutella*. *See id.* at 1255. Therefore, *Tennille* somehow overlooked *Nutella*. In any event, the court in *Tennille* itself acknowledged that the other circuit authority that it referenced merely made general statements about the limitations of appeal bonds, in the context of bonds covering (for example) attorneys' fees. *Id.* at 1254-55 & n.4. Despite that, Objector claims that *Tennille* "found the First, Second, Third, Fifth, Sixth, Ninth, Eleventh, and D.C. Circuits" do not provide for administrative costs to be included in a bond. Opp. at 6-7. Mysteriously, Objector does not cite any of those other circuit decisions. In fact, of the decisions *Tennille* referenced, only four of them—*Vaughn v. Am. Honda Motor Co.*, 507 F.3d 295 (5th Cir. 2007); *Azizian v. Federated Dep't Stores, Inc.*, 499 F.3d 950 (9th Cir. 2007); *In re Cardizem CD Antitrust Litig.*, 391 F.3d 812 (6th Cir. 2004) and *Pedraza v. United Guar. Corp.*, 313 F.3d 1323 (11th Cir. 2002)—were actually class action cases, 774 F.3d at 1254-55, so the other decisions could not have possibly reached such an explicit holding regarding settlement administration expenses. The four class action cases cited by *Tennille* do not support Weaver's argument either.

For example, in *In re Cardizem*, the Sixth Circuit actually held that "the district court was entitled to include in the bond amount attorney's fees, but it was [also] entitled to include any other damages incurred, ***presumably including administrative costs***." 391 F.3d at 818. And the other three cases all dealt only with attorneys' fees and made no mention of settlement administration expenses. *See Vaughn*, 507 F.3d at 299-300; *Azizian*, 499 F.3d at 962; *Pedraza*, 313 F.3d at 1333-35. Thus, Weaver has grossly mischaracterized *Tennille* and the cases cited therein.

Weaver cites cases to argue that "costs of delay" are not included. Opp. at 8-10 (citing *Vaughn*, 507 F.3d at 298-99; *In re Diet Drugs*, 2000 WL 1665134; *In re Am. President Lines, Inc.*, 779 F.2d 714, 717-18 (D.C. Cir. 1985); *In re AOL Time Warner, Inc., Sec. & "Erisa" Litig.*, No. 02 CV. 5575 (SWK), 2007 WL 2741033, at *4 (S.D.N.Y. Sept. 20, 2007)). None provide her with any support. As discussed above, *In re Diet Drugs* was a decision by this Court that predated *Nutella*. Also as discussed above, *Vaughn* dealt only with attorneys' fees. 507 F.3d at 299-300. *In re American President Lines* was less clear as to what costs were at issue, but it was not a class case, so it could not have related to settlement administration expenses. *See* 779 F.2d at 716. Finally, in *In re AOL Time Warner*, the Southern District of New York acknowledged that courts in other circuits take a different view of whether administration expenses can be included. 2007 WL 2741033, at *4 n.4. Following *Nutella*, the Third Circuit is one of those differing Circuits.[3]

In short, Objector would have this Court believe that eight different circuit courts have explicitly found that settlement administration costs are not includable in an appeal bond where, in reality, none of them have so held. There is no avoiding the fact that the Third Circuit's holding in *Nutella*—followed most recently by this Court in *Glaberson*—is the best and most on-point authority.[4]

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[3] To the extent "costs of delay" reference post-judgment interest, Plaintiff reaffirms that she is not seeking those to be included in the bond. *See* Mot. at 13 n.2.

C. Objector's appeal lacks merit.

In claiming her appeal has merit, Objector simply reargues her failed objection and opposition to final settlement approval. However, Objector limits the issues discussed to those surrounding attorneys' fees, the requirements imposed on objectors, and the information submitted by Class Counsel in support of the Settlement, Opp. at 12-15, implicitly acknowledging that the rest of her myriad objections do, indeed, lack merit. In any event, Objector merely borrows extensively from her prior briefing (and in some places copies verbatim). These are the same arguments that this Court carefully considered and rejected. She offers no argument that she will be able to demonstrate on appeal that the Court abused its discretion. Indeed, she never once mentions the abuse of discretion standard in her Opposition.

Later in her Opposition, Objector cites cases that stand for the non-controversial proposition that objectors can provide value. Opp. at 17. But none of those cases involved Bandas, whose well-documented history is one of meritless opposition to class settlements, solely to extort money for himself. *E.g.*, Mot. at 7-8, 11-12; *see also* Dkt. No. 83. The Honorable Valerie E. Caproni of the Southern District of New York recently called out Bandas' conduct for what it is: "a pattern, it is a strategy that is designed to throw monkey wrenches into class settlements so that you can get money to go away from the plaintiffs' lawyer." Dkt. No. 87-2 at 61. That is precisely what Bandas is doing here.

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[4] Moreover, Objector almost entirely fails to confront the overwhelming district court authority presented by Plaintiff in support of inclusion of settlement administration costs. Mot. at 16-17 & n.5. She briefly argues that the Court should ignore one case because a court of appeals *stayed* the bond, but she acknowledges that the Court ultimately did not reverse the bond. Opp. at 7-8 & n.9. She also points out that one other case is currently pending on appeal but has not been reversed. *Id.* at 8. Objector does not confront any of the other cases. Nor does Objector acknowledge the many cases in which courts have required Mr. Bandas's client to post a bond, including in amounts greater than the one requested here. Mot. at 7-8.

D. Objector's counsel is a bad faith and vexatious litigant.

Rather than confront the myriad court decisions finding Bandas to be a bad faith and vexatious litigant—Mot. at 11-12; *see also* Dkt. No. 83—Objector instead points to two cases wherein Bandas allegedly achieved some measure of success. Opp. at 15-16. In one, *Eubank v. Pella Corp.*, 753 F.3d 718, the settlement was reversed based on the objection of four objectors who were formerly named plaintiffs but there is no indication that any were Bandas's client. *Id.* at 722-24. In the other, *Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. 2012), the Court remanded a case where $2 million remained for a *cy pres* distribution following $800,000 in claims being made under the settlement. *Id.* at 864, 868. Here, there is no guarantee of a *cy pres* distribution, and if there is one, it will be a small fraction of the settlement award, *see* Dkt. No. 82-1 at 28, and not two-and-a-half times as large as the settlement at issue in *Dennis*. In short, presented with a history of likely over one hundred settlement objections, *id.* at 31 & n.7, and countless negative court opinions admonishing his conduct, Dkt. No. 83, Bandas responds by arguing that he might have been successful in a single case. His track record speaks for itself.

And contrary to Objector's assertion, Plaintiff *has* demonstrated the conduct in *this case* has been in bad faith and vexatious. Weaver improperly filed a document under seal in connection with her objection back in June, but she has still not served it on Class Counsel. *See* Mot. at 8 & Ex. B. And now, in her Opposition to imposition of a bond, Weaver has made her bad faith and vexatious intent explicit. In the final page of the Opposition, Weaver stated, "Finally, if the Court grants plaintiffs' motion and imposes a $256,000 bond, Ms. Weaver intends to move to stay the bond order pending review in the Third Circuit. This will create the very delay that Class Counsel claim they wish to avoid." Opp. at 18. Essentially, Weaver has taken the position that ***she will definitely appeal***, even if the Court's decision is well-reasoned and grounded in law. She admits that her conduct "will create the very delay that Class Counsel claim they wish to avoid." The statement amounts to an explicit admission that Weaver's sole intent here is to hold the Settlement hostage, to the detriment of the Settlement Class Members (not to mention this Court's docket). Now that Objector has admitted that her intent is simply to cause improper delay, the Court should not condone this conduct.

CONCLUSION

For these reasons set forth above, Plaintiff respectfully requests that the Court grant the Class's Motion.

Dated: August 29, 2016

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CERTIFICATE OF SERVICE

I, Hassan Zavareei, hereby certify that the foregoing document was filed via the Court's CM/ECF system on August 29, 2016, thereby causing a true and correct copy to be served on all ECF-registered counsel of record.

/s/ Hassan A. Zavareei
Hassan A. Zavareei